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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

149355

DUPLICATE

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In re Application of

WPEO RADIO FOUNDATION, INC.

For minor modification of facilities  
FM Translator Station  
W277AQ Canton, Illinois

To: Office of the Secretary  
Attn: Audio Division

FILE NO. BPFT-20120413ACM  
FAC ID No. 149355

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COMMUNICATIONS DIVISION

JOINT INFORMAL OBJECTION

Nelson Broadcasting, Inc., ("NBI") and American Education Foundation, Inc., ("AEFI") (NBI and AEFI jointly referred to herein as "Petitioners"), by their counsel, hereby object to the above-captioned application filed by WPEO Radio Foundation, Inc., ("WPEO").<sup>1</sup> In support thereof, the following is shown:

The above-captioned application proposes a new frequency, tower site and service area at Peoria, IL, for FM translator W277AQ. NBI is the licensee of WOAM(AM) Peoria, IL, and would compete for listeners with facilities proposed for W277AQ. AEFI is the licensee of station W277AT which has an application pending in File No. BPFT-20120511ABB for minor modification of W277AT facilities to specify the same channel and community proposed by WPEO's above-captioned application.<sup>2</sup>

Section 74.1233(a) of the rules requires that in the case of an FM translator minor change application the 60 dBU contours of the existing and proposed FM translator

<sup>1</sup> As the proposed assignee of station W277AQ, WPEO filed BPFT-20120413ACM contingent upon the grant and consummation of the assignment application pending in File No. BALFT-20120314ACX. c.f., 47 CFR 73.3517.

<sup>2</sup> File No BPFT-20120577ABB is in a processing queue behind WPEO's above-captioned application pursuant to Section 74.1233(d)(1) of the rules.

facilities overlap. WPEO concedes that the subject pending application fails to comply with this minor change application requirement as its two contours do not overlap and seeks two separate waivers in this regard. First, WPEO asks the Commission to process the subject application using the minor change waiver standard applied in Letter to John F. Garziglia, Station W263AQ, Mattoon, IL, DA 11-1495, dated September 2, 2011 (“Cromwell Waiver”). However, WPEO concedes that it fails to satisfy all requirements for a Cromwell Waiver and it requests a separate waiver of the element requiring that “the proposed facility is mutually exclusive to its licensed facility.”

Petitioners respectfully submit that the waiver requests must be denied and the underlying application dismissed because WPEO has failed to satisfy the Commission’s waiver requirements. An applicant seeking a waiver has the burden to plead with particularity the facts and circumstances that warrant such action. Thus, an applicant for waiver “faces a high hurdle even at the starting gate.” Although the Commission must consider carefully all waiver requests, such requests must be supported by a compelling showing in order to be granted. A waiver from the Commission is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. Generally, the Commission may grant a waiver of its rules in a particular case only following a “hard look” and if the relief requested would not undermine the policy objective of the rule in question, and would otherwise serve the public interest. See, e.g., Id. and, WAIT Radio v. FCC 418 F2d 1153, 1157 (D.C. Cir. 1969)

In relevant part, the Cromwell Waiver establishes that an application may qualify as a minor change without 60 dBu contour overlap by demonstrating that the FM

translator's current and proposed facilities are mutually exclusive to one another. In establishing this element of the narrowly tailored Cromwell Waiver, the Commission took great care to consider potential implications related to the rights of third party applicants to file timely competing applications under Ashbacker Radio Corp. v FCC 326 US 327 (1945) ("Ashbacker"). In granting the Cromwell Waiver, the Commission gave significant weight to the fact that "potential applicants are already precluded from requesting such a new allotment because of the mutual exclusivity with the existing one." It emphasized that, in the absence of mutual exclusivity, it could not treat the application as a minor change without negating the rights of potential competing applicants:

[W]here there is no mutual exclusivity, and absent some other legitimate justification for limiting the ability to compete equally, we believe that the minor change treatment of FM translator applications would abrogate the Ashbacker rights of potential competing applicants.

Letter to John F Garziglia @ p. 4.

Petitioners submit that WPEO has failed to clear the requisite "high hurdle" required for its requested waivers because the showing presented in support is speculative, has no basis in law or policy, and WPEO has failed to demonstrate how the public interest would be served by grant of the waivers.

WPEO asks the Commission to waive the mutual exclusivity element of the Cromwell Waiver on the basis that W277AQ is being displaced from its current channel by a primary service FM station. It claims that displacement alone creates sufficient "legitimate justification" to waive the mutual exclusivity requirement and the Commission may do so without "obsessing over the rights of unknown others apply for an authorization for a new station in the future using the very channel that is claimed by an applicant seeking displacement relief." WPEO Waiver Request @ p. 3.

WPEO avers broadly and without authority that the Commission has circumvented Ashbacker “innumerable times” to accommodate FM translator displacement relief. Perforce, any waiver of Ashbacker rights may be granted only following thorough review of the specific facts and circumstances and authorized in only the most compelling cases<sup>3</sup> with full consideration to the rights of potential applicants. As WPEO fails to identify any such waivers and offers no basis to compare such waivers, if any, with its own pending application, it presents no compelling showing that Ashbacker rights should (or could) be waived in this proceeding.

WPEO also claims that denial of the waiver would be a “death sentence” for W277AQ. This dramatic statement fails to address the facts and circumstances regarding what rule compliant options might be available to W277AQ. For example, WPEO utterly fails to show that a Cromwell Waiver is the only option available to resolve W277AQ’s displacement at Canton. WPEO makes no showing concerning available alternate channels or why it is not possible to propose a modification of facilities which is wholly compliant with Commission rules and policies. Moreover, the conclusory statement fails to consider that displacement is not unusual for secondary service FM translator stations; is contemplated by Section 74.1203(e) of the Commission’s rules, and the Commission does not grant automatic or routine displacement relief to FM translator stations. For example, in Limit for NCE FM New Station Applications in October 12 - October 19, 2007 Window, 22 FCC Rcd 18699 (2007), the Commission acknowledged the inherent risk that secondary service FM

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<sup>3</sup> See, e.g., Greater Media Radio Co., Inc. 418 F.2d 1153 (D.C. Cir 1969)

translators stations are always subject to displacement and found that was no basis to afford special filing privileges to noncommercial FM translator licensees in a primary service NCE application filing window. In Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures 26 FCC Rcd 2556, parag. 45 (2011), the Commission declined to codify rules concerning FM translator displacement proposals and directed the staff to continue to consider such requests on a case-by-case basis. Contrary to WPEO's allegation, FM translator displacement is neither unusual nor guaranteed special treatment.

Lastly, WPEO asserts that its proposed CH298 is vacant; that no party has demonstrated interest in its use; that reserving CH298 for an unknowable potential future use would not result in net gain of potential service; and that W277AQ has "no way" to continue operation without the requested waiver. As stated above, the claim that there is "no way" to continue operation is undermined by WPEO's failure to consider alternate, rule-compliant, modification proposals. WPEO's unfounded speculation and surmise about why CH298 might be vacant or when an application might be submitted is immaterial. WPEO utterly fails to show that speculation is an adequate basis for a waiver request. See, e.g., Fireside Media and Jet Fuel Broadcasting, 26 FCC Rcd 15705, parag. 4, (2011) (courts have rejected as insufficient vague assertions of a public interest benefit that rely on speculation.) Moreover, as noted above, AEFI has a pending application specifying facilities on CH298 at Peoria, See File No. BPFT-20120511ABB.

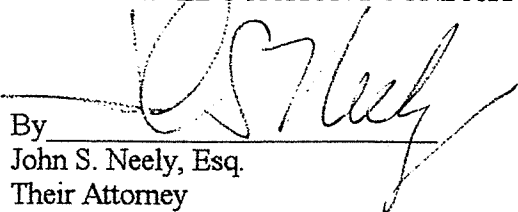
It is respectfully submitted that, having failed to present a compelling showing to justify waiver of the mutual exclusivity component required for a Cromwell Waiver, the entire Cromwell Waiver should be denied and the above-captioned application dismissed.

Respectfully Submitted,

NELSON BROADCASTING, INC.  
AMERICAN EDUCATION FOUNDATION, INC.

May 11, 2012

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By   
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Their Attorney

I certify that on May 11, 2012, a copy of the foregoing document was placed in the United States mail, first class postage prepaid, addressed to the following:

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